No. 88-162

IN THE

Supreme Court of the United States

October Term, 1987

CLEVELAND BOARD OF EDUCATION,
Cross-Petitioner,

vs.

JAMES LOUDERMILL,
Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

THOMAS C. SIMIELE
General Counsel
JAMES G. WYMAN
Counsel of Record
Cleveland Board of Education
1380 East Sixth Street
Cleveland, Ohio 44114
(216) 574-8210
Attorneys for Cross-Petitioner
Cleveland Board of Education

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

I. Is a party entitled to attorney's fees when he has succeeded on absolutely no issues in the litigation of the case?

II. Is a party entitled to attorney's fees on the "catalyst" theory when the sole defendant successfully defended each and every claim of wrong doing and made no changes in its past or present practices whatsoever?

III. Is a party entitled to attorney's fees on the "catalyst" theory for establishing the right to a pretermination hearing for governmental employees with protected property interests when such right had been established by previous Supreme Court decision?

IV. Is a party entitled to attorney's fees when the only success achieved was a procedural victory allowing him to file his Complaint in the United States District Court?

On June 23, 1988, Cross-Petitioner Cleveland Board of Education received the Petition for a Writ of Certioriari filed by Petitioner Loudermill.

REASONS FOR GRANTING REVIEW

I. The decision of the United States District Court for the Northern District of Ohio is contrary to all preceding case law on the award of attorney's fees.

II. Imposition of the attorney's fees on a defendant who through trial has proven to have given a plaintiff all constitutionally required rights and who has won on every issue of substance is unequitable, unjust and itself unconstitutional.

III. An award of attorney's fees is improper as Cross-Respondent has succeeded only in securing a procedural victory and has failed on each and every claim of merit in his Complaint.

III.

PARTIES

The Plaintiff-Appellee in the proceeding in the Court of Appeals was James Loudermill. The Defendant-Appellant in the Court of Appeals was the Cleveland Board of Education.

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No._____

IN THE

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vs.

JAMES LOUDERMILL,
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CROSS-PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals For the Sixth Circuit

The Cleveland Board of Education cross-petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on April 6, 1988, in Case No. 86-4069, affirming a decision and order of the United States Court for the Northern District of Ohio which determined Cross-Respondent to be the prevailing party for purposes of attorney's fees.

OPINIONS BELOW

The decision of the United States District Court concerning attorney's fees dated February 25, 1987 is attached in the Appendix to the instant cross-petition. The decision of the United States Court of Appeals for the Sixth Circuit dated April 6, 1988 appears in the Appendix of Petitioner in Case No. 87-2099.

JURISDICTIONAL STATEMENT

This cross-petition seeks review of decisions of the United States District Court rendered February 25, 1987 and United States Court of Appeals for the Sixth Circuit rendered April 6, 1988. Jurisdiction is invoked pursuant to Title 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C. §1988 in pertinent part provides:

> "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

This case was originally filed on October 27, 1981, in the United States District Court for the Northern District of Ohio. At the time of filing, Cross-Respondent also filed a Motion to Proceed *in forma pauperis* asserting he was unable to pay the fees for the filing of the case. Jurisdiction was invoked under 28 U.S.C. §1343(3) and (4).

On November 6, 1981, the District Court *sua sponte* dismissed the complaint for failure to state a claim on which relief could be granted and denied Cross-Respondent's motion for leave to proceed *in forma pauperis*. This was done prior to any service upon Defendant-Appellee Cleveland Board of Education. On November 17, 1983, the Sixth Circuit Court of Appeals affirmed the Court's dismissal of "that part of [the complaint] which alleged that delays in post-termination hearings violated [Loudermill's] due process rights" but vacated and remanded "that part of the District Court's judgment that dismissed the pretermination procedural due process claim." *Loudermill v. Cleveland Board of Education*, 721 F.2d 550, 564 (1983). The United States Supreme Court affirmed the Sixth Circuit's decision and remanded the case for further proceedings. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

On or about September 9, 1986 (prior to trial) Cross-Respondent James Loudermill filed a motion for attorney's fees. Cross-Petitioner Cleveland Board of Education filed its brief in opposition to James Loudermill's motion on November 13, 1986.

On October 17, 1986, the United States District Court issued its findings of fact and conclusions of law on the trial that was held. The Court found for the

Cross-Petitioner Cleveland Board of Education on all issues. Cross-Respondent filed his notice of appeal of the decision of the United States District Court on the merits of the trial on November 17, 1986.

On December 8, 1986, the United States District Court found that "... Loudermill is the prevailing party for purposes of 42 U.S.C. §1988," and determined that the amount of said fees would be the subject of a later hearing.

On April 3, 1987, the District Court determined that its order on attorney's fees was final and appealable pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and that there was no just cause for delay of an appeal.

On May 1, 1987, Cross-Petitioner Cleveland Board of Education filed its notice of appeal on the issue of attorney's fees.

On April 6, 1988, the United States Court of Appeals for the Sixth Circuit affirmed the decisions of the United States District Court.

On June 24, 1988, Cross-Respondent filed a Petition for Certiorari on the decision of the United States Court of Appeals on the merits of his claim.

Cross-Petitioner presently seeks Certiorari on the issue of attorney's fees.

STATEMENT OF FACTS

Cross-Respondent originally filed his complaint on October 27, 1981, in the United States District Court for the Northern Division of Ohio. On November 6, 1981, that Court, prior to service on Cross-Petitioner Cleveland Board of Education, dismissed Cross-Respondent's complaint *sua sponte.*

On November 17, 1983, this Court affirmed the District Court's opinion in part (dealing with post-termination due process) and reversed in part (dealing with pretermination due process).

The United States Supreme Court affirmed the Sixth Circuit's decision on March 19, 1985, and stated in part:

> "Because Respondents [Loudermill and Donnelly] allege in their complaints that they had no chance to respond [to the charges made against them], the District Court erred in dismissing for failure to state a claim. The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion."

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 548 (1985).

On remand, Cross-Petitioner filed its answer, this case came on to be heard, and the United States District Court found in favor of Cross-Petitioner Cleveland Board of Education on all issues.

Having won only a procedural victory, *i.e.,* the right to file his complaint, Cross-Respondent filed for attorney's fees. After briefing and on December 8, 1986, the District Court found Cross-Respondent to be the prevailing party for the purpose of Title 42 U.S.C. §1988.

Thereafter, Cross-Petitioner appealed this decision to the United States Court of Appeals for the Sixth Circuit and on April 6, 1988 said Court affirmed the decision of the United States District Court.

Cross-Petitioner now seeks Certiorari on said decision.

ARGUMENT

In order for a plaintiff to receive an award of attorney's fees, he must either succeed on merits of his claims, cause the defendant to make significant changes in past practices, or be able to make a showing that plaintiff or plaintiffs' class achieved some significant benefit as a result of the litigation brought.

Under any of the above requirements, or any other logical or equitable standard this Court might wish to establish, Cross-Respondent in the instant case has no claim for attorney's fees. The United States District Court's determination that Cross-Respondent is the prevailing party for purposes of 42 U.S.C. §1988 is patently incorrect and must be reversed.

I. CROSS-RESPONDENT HAS SUCCEEDED ON ABSOLUTELY NO ISSUES IN THE LITIGATION OF THIS CASE.

Cross-Respondent asserts that he:

> "may be considered prevailing part[y] for attorney's fees purposes if [he] succeed]s] on any *significant* issue in litigation which achieves *some of the benefit the parties sought in bringing suit.*" (Emphasis added.)

Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (1st Cir. 1978).

The relief Cross-Respondent sought in bringing suit, as taken from the prayer of his complaint, was specifically:

> "1. That he be reinstated to his position and awarded his back-pay and other benefits plus simple interest for the time that he was unlawfully deprived of his employment, and
>
> 2. Compensatory damages in the amount of one hundred thousand dollars ($100,000.00), and

3. A judgment declaring Ohio Revised Code Section 124.34 unconstitutional on its face and as applied, and

4. Preliminary and Permanent Injunctions prohibiting the removal or suspension of classified civil service employees without full compliance with the requirements of the due process clause of the Fourteenth Amendment to the United States Constitution, and

5. Preliminary and Permanent Injunctions ordering reinstatement with full back pay and other benefits plus interest; and

6. Certification of this case as a class action; and

7. That the defendants be ordered to pay the plaintiff for his costs in prosecuting this case including a sum for his reasonable attorney's fees."

A simple review of the District Court's Opinion in this case indicates that Cross-Respondent *has not been able to achieve any* of the benefits which he sought in bringing suit. Cross-Respondent was not reinstated to his position or awarded backpay. Cross-Respondent was not awarded compensatory damages.

Ohio Revised Code Section 124.34 was not declared unconstitutional. There were no preliminary and/or permanent injunctions issued. The proposed class was never certified.

Cross-Respondent, in short, failed miserably. Cross-Respondent did not even seek the right to a pretermination hearing in his complaint. He asserted, generically, that his due process rights were violated. The District Court has now found *specifically* that Cross-Respondent's due process rights were *not* violated. The only success Cross-Respondent has achieved has been a

procedural victory establishing that his complaint did in fact state a cause of action upon which relief could be granted. Cross-Respondent failed, however, to prove that Cross-Petitioner Cleveland Board of Education violated any of his constitutional rights.

Cross-Respondent has, in conclusion, achieved nothing save for overcoming an initial procedural dismissal of his complaint. Attorney's fees should not be awarded under such circumstances.

II. CROSS-RESPONDENT DID NOT CAUSE CROSS-PETITIONER CLEVELAND BOARD OF EDUCATION TO MAKE ANY CHANGES IN ITS PAST OR PRESENT PRACTICES CONCERNING DISCHARGE.

Cross-Respondent asserts that "by establishing a clear, causal relationship between the litigation brought and the practical outcome realized . . ." *Ridgeway v. Montana High School Association*, 638 F. Supp. 326, 330 (D.C. Mont. 1986), he has been a catalyst to changing a practice concerning discharge procedures. The record is void as to any such changed practice.

The Cleveland Board of Education did not change any rule, regulation or practice in response to Cross-Respondent's action. The only evidence of any kind before this Court is a one page document, which appears to be an update, written by the City of Cleveland, which specifically required pretermination hearings in Civil Service cases. The previous practices of the Civil Service Commission are unknown and not a part of the record. Thus, there is no evidence that the *Loudermill* case was a catalyst to any significant change and NO EVIDENCE WHATSOEVER that this case changed any of the practices or procedures of the Cross-Petitioner Cleveland

Board of Education. Cross-Respondent has failed to meet the heavy burden to establish that his action was responsible for legislative reform. *See, Cicerio v. Olgiati,* 473 F. Supp. 653 (D.C.N.Y. 1979).

Assuming, *arguendo,* that the catalyst test is applicable, which Cross-Petitioner Cleveland Board of Education specifically and adamantly denies, Cross-Respondent still must fail on his claim. In reaching the test in *Ridgeway, supra,* the Ninth Circuit relied on *Rivera v. City of Riverside,* 679 F.2d 795 (9th Cir. 1982), a case where plaintiffs recovered attorney's fees because those plaintiffs had "succeeded on the most significant issue of the litigation. They proved that their civil rights had been violated." *See, Ridgeway, supra,* at 330.

In the present case, Cross-Respondent has not succeeded in establishing a clear, causal relationship between the litigation and any practical outcome.

In fact, Cross-Respondent has *failed* to prove that either his civil rights or his constitutional rights were abridged by Cross-Petitioner Cleveland Board of Education or any other defendant. The right to a pretermination hearing was well established law in regard to public employees prior to Loudermill's suit. *See, Board of Regents v. Roth,* 408 U.S. 564, at 569-570, 571 (1972); *Arnett v. Kennedy,* 416 U.S. 134, 170-171 (1974); *Mathews v. Eldridge,* 424 U.S. 319, 343 (1976); *Goldberg v. Kelly,* 397 U.S. 254, 264 (1970); *Goss v. Lopez,* 419 U.S. 565, 583-584 (1975); *see, also,* Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267, 1281 (1975).

Similar to the present case, the *Roth* case involved a public school employee. The primary issue in *Roth* was whether the employee had a right to a pretermination hearing. The Court stated:

> "When protected interests are implicated, the right to some kind of prior hearing is permanent."

Roth, supra, at 571.

Since *Roth,* decided in 1971, determined that public employees had a right to a pretermination hearing, Cross-Respondent cannot now be heard to claim that his 1985 case established this right. Such an argument is totally without merit.

Cross-Respondent's action did not establish any new law. Cross-Respondent's action did not change any law or declare any statute unconstitutional in respect to Cross-Petitioner or otherwise. Cross-Respondent's action did not change any practice of Cross-Petitioner. Cross-Respondent's action was never even certified as a class and, therefore, no class could have benefited by his alleged procedural victory.

The causal relationship, if any exists, is more clearly between prior United States Supreme Court precedent and a right to a pretermination hearing, not between *Loudermill* and this right. *Loudermill* was a multi-issue case in which the United States Supreme Court clearly did not establish a right to a pretermination hearing for public employees, but merely affirmed the right to this specific Cross-Respondent by citing and following well-established precedent.

Therefore, Cross-Respondent should not be awarded attorney's fees.

III. THE DUE PROCESS RIGHT TO A PRETERMINATION HEARING WAS ESTABLISHED WELL BEFORE THE UNITED STATES SUPREME COURT DECIDED THE LOUDERMILL CASE.

The Supreme Court makes the best argument that a right to a pretermination hearing was not new law but was a well-established principle before *Loudermill.* In the *Loudermill* case the United States Supreme Court stated:

> "An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950). We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971) (emphasis in original); *see, Bell v. Burson,* 402 U.S. 535, 542 (1971). This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. *Board of Regents v. Roth,* 408 U.S., at 569-570; *Perry v. Sinderman,* 408 U.S. 593, 599 (1972). *As we pointed out last Term, this rule has been settled for some time now. Davis v. Scherer,* 468 U.S. _____, _____, n. 10 (1984); id., at _____ (Brennan, J., concurring in part and dissenting in part). Even decisions finding no constitutional violation in termination procedures have relied on the existence of some pretermination opportunity to respond. For example, in *Arnett* six Justices found constitutional minima satisfied where the employee had access to the material upon which the charge was based and could respond orally and in writing and present rebuttal affidavits. *See also, Barry v. Barchi,* 443 U.S. 55, 65 (1979), (no due

process violation where horse trainer whose license was suspended "was given more than one opportunity to present his side of the story"). (Emphasis added.)

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985).

"This rule [requiring some kind of hearing prior to the discharge of an employee] has been settled for some time now." *Davis v. Scherer, supra.* Cross-Respondent's argument contradicts the specific language of the Supreme Court.

Cross-Respondent has established no new precedent nor has he or any class reaped any benefit because of his case. The Supreme Court language is clear. The due process requirement of a right to a pretermination hearing was well settled law prior to Loudermill, and no precedent supports an award of attorney's fees for a mere affirmation or even a mere clarification of existing law. As a result, Cross-Respondent's plea for attorney's fees must fail.

IV. CROSS-RESPONDENT HAS SUCCEEDED ON A PROCEDURAL MATTER ONLY AND THUS SHOULD BE PRECLUDED FROM BEING AWARDED ATTORNEY'S FEES.

Cross-Respondent claims that he is entitled to attorney's fees "irrespective of whether or not he personally obtains any individual relief". However, to support this argument, Cross-Respondent cites cases which invariably have awarded personal injunctive or monetary relief to either the plaintiff or the formally certified plaintiff's class.

In *Price v. Pelka*, 690 F.2d 98 (6th Cir. 1982), plaintiffs received injunctive relief which allowed them fair, nondiscriminatory housing. In *Northcross v. Board of Education at Memphis City Schools*, 611 F.2d 624 (6th Cir. 1980), plaintiff received injunctive relief in their school desegregation case.

In *Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977), plaintiffs received injunctive relief which changed a voting plan. In *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978), plaintiff prevailed on the merits; plaintiff prisoners won access to libraries.

In *Fast v. School District of the City of Ladue*, 728 F.2d 1030 (8th Cir. 1984), plaintiff was awarded nominal damages, and the Court found that the defendant clearly failed to provide reasons for its dismissal of the plaintiff. In *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 40 (1968); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); and *Reed v. Arlington Hotel Co.*, 476 F.2d 721 (8th Cir. 1973), a properly certified class was awarded relief. In *Kelly v. Metropolitan County Board of Education*, 773 F.2d 677 (6th Cir. 1985), the plaintiff's class clearly benefitted because the Court ordered desegregation.

Cross-Respondent has argued that the case of *City of Riverside v. Rivera*, *supra*, supports his request for attorney's fees. In *Rivera*, plaintiffs were awarded $33,350 in compensatory and punitive damages due to 11 violations of 42 U.S.C. §1983, 4 instances of false arrest and imprisonment, and 22 instances of negligence.

In the present case, Cross-Respondent's attorneys have gained nothing for their clients, yet they still demand attorney's fees. The case *sub judice* was never even certified as a class action. Such a proposition can not stand logical scrutiny.

More directly on point is the case of *Hanrahan v. Hampton*, 446 U.S. 754 (1980), wherein the Supreme Court held that attorney's fees were not awardable because the plaintiff therein had merely successfully appealed a directed verdict. All Cross-Respondent has accomplished in the instant case is to successfully appeal the District Court's *sua sponte* dismissal of his complaint. The Sixth Circuit has taken a similar position in deciding that a party cannot prevail if neither back-pay, reinstatement, nor injunctive relief was awardable and, therefore, no attorney's fees could be awarded despite the establishment of a Title VII violation. *Harrington v. Vandalia-Butler Board of Education*, 585 F.2d 192 (6th Cir. 1978) *cert. den.* 441 U.S. 932, 99 S. Ct. 2053 (1978).

Defendant Cleveland Board of Education respectfully submits that the term "prevailing party" cannot "be stretched to include this situation." *Miller v. Texas State Board of Barber Examiners*, 615 F.2d 650 (5th Cir. 1980) *cert. den.* 449 U.S. 891 (1980). Cross-Respondent is simply not entitled to attorney's fees.

CONCLUSION

Cross-Respondent is not a prevailing party, by the United States Supreme Court's, by the Sixth Circuit's, or by any other recent Federal Court's definition. Cross-Respondent did not cause Cross-Petitioner Cleveland Board of Education to make any change in its past practices.

The Supreme Court has held that the due process requirement of a pretermination hearing was well-settled law prior to *Cleveland Board of Education v. Loudermill,* 477 U.S. 532, 547-548 (1985). Therefore, Cross-Respondent did not establish new law.

Finally, this United States District Court has held that Cross-Petitioner provided Cross-Respondent with a pretermination hearing, and that Cross-Respondent consequently achieved no benefit for himself in bringing suit.

Cross-Respondent's argument that he is entitled to attorney's fees even though no existing law was changed and even though Cross-Petitioner complied fully with existing law is infelicitous. For this Court to adopt Cross-Respondent's contention would be tantamount to establishing an unfair, unprecedented and inappropriate standard of law. Cross-Petitioner Cleveland Board of Education respectfully submits that neither precedent nor logic permits such a conclusion.

Cross-Petitioner requests that the United States District Court's determination that Cross-Respondent is a prevailing party under Title 42 U.S.C. §1988 be reversed.

Respectfully submitted,

THOMAS C. SIMIELE
General Counsel
JAMES G. WYMAN
Counsel of Record
Cleveland Board of Education
1380 East Sixth Street
Cleveland, Ohio 44114
(216) 574-8210
Attorneys for Cross-Petitioner

APPENDIX

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed February 25, 1987)

Case No. C81-2132

Judge John M. Manos

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES LOUDERMILL,
Plaintiff,

v.

CLEVELAND BOARD OF EDUCATION,
Defendant.

MEMORANDUM OF OPINION

On October 21, 1981, James Loudermill, plaintiff, filed the above-captioned case alleging that the Cleveland Board of Education, the City of Cleveland, and the Cleveland Civil Service Commission ("Commission"), defendants, had violated his civil rights under 42 U.S.C. §1983 by failing to provide him with a hearing prior to the termination of his employment and by denying him a prompt posttermination hearing. On November 6, 1981, this court dismissed the complaint for failure to state a claim on which relief could be granted. On November 17, 1983, the Sixth Circuit Court of Appeals held that the

delay in providing the posttermination hearing did not constitute a violation of Loudermill's right to due process but that a civil service employer must provide its classified civil service employees with "some opportunity to present evidence on their own behalf prior to discharge." *Loudermill v. Cleveland Board of Education*, 721 F.2d 550, 552 (6th Cir. 1983).

On March 19, 1985, the United States Supreme Court affirmed the decision of the court of appeals. *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487 (1985). The Supreme Court held that "[t]he tenured public employee is entitled to oral or written notice of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 1495. It remanded the case for further proceedings. *Id.* at 1496.

In November of 1985, the Cleveland Civil Service Commission amended Civil Service Rule 9.20 to provide that a classified civil service employee must receive a pretermination hearing. On September 11 and 12, 1986, this court tried the issue of whether Loudermill had received a pretermination hearing and found that he had. The case is currently before the court to determine if Loudermill is a "prevailing party" under 42 U.S.C. §1988.[1] For the following reasons, the court holds that Loudermill is a prevailing party.

A plaintiff may be considered a prevailing party if he succeeds "on any significant issue in litigation which achieves some of the benefit [he] sought in bringing suit."

---

[1] 42 U.S.C. §1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). Even if the plaintiff does not obtain direct relief, he may qualify as a prevailing party if the lawsuit served as the catalyst which caused the defendant "to make significant changes in its past practices. . . ." *Othen v. Ann Arbor School Board*, 699 F.2d 309, 313 (6th Cir. 1983); *see also Dover v. Rose*, 709 F.2d 436, 439 (6th Cir. 1983); *Nadeau*, 581 F.2d at 279.

In the instant case, Loudermill did not establish that he was denied a pretermination hearing and entitled to direct relief. However, because of his lawsuit, the United States Supreme Court held that a pretermination hearing must be provided to an employee who has a property interest in his employment. *Loudermill*, 105 S.Ct. at 1493. *Subsequently, the Commission amended its rules to provide for a pretermination hearing.* The court concludes that Loudermill's lawsuit served as a catalyst for this amendment. Further, the amendment resulted in a significant change because, before the amendment, a civil service employee was limited to posttermination review of his discharge. Accordingly, the court holds that Loudermill is a prevailing party for purposes of 42 U.S.C. §1988.[2]

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

[2] The amount of the attorney's fee will be determined by this court on a later date.

Case No. C81-2132

Judge John M. Manos

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES LOUDERMILL,
Plaintiff,

v.

CLEVELAND BOARD OF EDUCATION,
Defendant.

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the court holds that Loudermill is a prevailing party for purposes of 42 U.S.C. §1988.

IT IS SO ORDERED.

/s/ JOHN M. MANOS
United States District Judge

NO. 88-162

SUPREME COURT OF THE UNITED STATES

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Cross-Petitioner

- vs -

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CROSS-RESPONDENT'S BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

BERGER & FERTEL
SANFORD J. BERGER, Counsel of Record
ROBERT M. FERTEL
1836 Euclid Ave., Room 305
Cleveland, Ohio 44115-2234
Phone: (216) 781-5950

Lawyers for the Cross-Respondent, James Loudermill

THOMAS C. SIMIELE, General Counsel
JAMES G. WYMAN, Counsel of Record
Cleveland Board of Education
1380 East Sixth Street
Cleveland, Ohio 44114
Phone: (216) 574-8210

Lawyers for the Cross-Petitioner, Cleveland Bd. of Education

I

PARTIES

The Plaintiff-Appellee in the proceeding in the Court of Appeals was James Loudermill. The Defendant-Appellant in the Court of Appeals was the Cleveland Board of Education.

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OPINIONS BELOW

The decision of the United States District Court for the Northern District of Ohio on the merits was dated October 17, 1986, while the decision of that court on the request for attorney fees was dated February 25, 1987, but not made into an order until April 13, 1987.

The United States Court of Appeals for the Sixth Circuit's Opinion affirming both judgments was dated April 6, 1988.

Both Opinions are set forth in the Cross-Respondent's (Loudermill's) Appendix, while the district court's Opinion regarding the attorney fees issue is in the Cross-Petitioner's (Board's) Appendix. However, the Board has neglected to include the district court's Opinion of April 13, 1987, rendered under F.R.C.P. 54(b), wherein it made its' February 25, 1987 Opinion into a final order.

STATEMENT OF THE CASE

Loudermill's appeal to the Court of Appeals on the merits was docketed by that court as Case No. 86-4069, while the Board's subsequent appeal on the sole issue of attorney fees was later docketed as Case No. 87-3435. For convenience and accomodation purposes only, the Court of Appeals then consolidated both appeals for argument and decision upon the request of the Board.

In its' Cross-Petition, the Board states that it is seeking review of the judgment of the Court of Appeals in Case No. 86-4069. Not so! That appeal involved the judgment on the merits only, and did not seek review of the award of attorney fees judgment.

As such, the Board is actually seeking review of Case No. 87-3435, which involved the appeal from the order granting Loudermill's counsel's request for attorney fees. Again, although both appeals were consolidated for purposes of oral argument and decision in the Court of Appeals, they still remain two separate appeals from two separate judgments, and bear two separate case numbers for purposes of review by this Court.

Consequently, the Cross-Petition for a Writ of Certiorari (seeking review of the attorney fees issue only, and filed in this Court on July 23, 1988), was not filed within ninety (90) days of the April 6, 1988 Court of Appeals Opinion in Case No. 87-3435, (but rather 108 days), as required by 28 U.S.C. Sec. 2101(c), and this Court's Rule 19.5 is inapplicable as the Court of Appeals decision pertained to two (2) judgments, not just one judgment.

FACTS

In 1981, Loudermill filed a class action Complaint in the United States District Court for the Northern District of Ohio wherein he sought to establish federal Due Process pretermination procedures for all tenured governmental employees in the United States, as well as obtain re-instatement to his job with the Board.

Even though the Loudermill case was never certified as a class action, Loudermill succeeded in establishing federal Due Process safeguard procedures by the original decision of the Sixth Circuit Court of Appeals, 721 F.2d 550 (1983), and the decision of this Court, 470 U.S. 532 (1985).

Upon remand by this Court to the district court, the district court subsequently found that Loudermill had received a pretermination hearing that complied with federal Due Process, but also found that he was a "prevailing party" entitled to an award of attorney fees, even though he did not obtain any individual relief, because as a direct result of his lawsuit he obtained a U.S. Supreme Court decision that pretermination Due Process hearings must be provided to any governmental employee who had a constitutionally protected property interest in his employment. The district court also found that subsequent to this Court's 1985 Loudermill decision, the Cleveland Civil Service Commission amended its Rules to provide for pretermination procedures -- which then became the Rules for the Board's termination of a tenured employee under Ohio law.

Contrary to the assertions of the Board, Loudermill presented evidence to the district court as to the Rules of the Cleveland Civil Service Commission both prior and subsequent to this Court's 1985 Loudermill decision.

On the other hand, the Board never presented any evidence

whatsoever in support of its assertion that it did not change any of its procedures as a result of the Loudermill decision.

It should also be noted that it was the Board who sought review by this Court of the 1983 Court of Appeals decision, which held that federal constitutional Due Process required some pretermination procedures.

Obviously, the Board (and 19 other states as amicus curiae) were trying to protect their previously enjoyed right to terminate tenured governmental employees without any pretermination procedures.

REASONS FOR DENYING CERTIORARI

As has been pointed out, it should suffice that an appeal to this Court which was filed 108 days after judgment (even if erroneously styled as a Cross-Petition under Rule 19.5) is untimely filed; should not have been accepted and filed by the Clerk, and must be stricken. In the possible event that this Court does not agree with Loudermill's reasoning, then he herewith submits further reasons as to why the Cross-Petition of the Board should not be accepted by directly responding to the four Questions propounded by the Board.

Before that, however, Loudermill would like to make it clear that a request for attorney fees in a federal civil rights case raises issues that are collateral to, and separate from, the decision on the merits. White v. New Hampshire Department of Employment Security, 455 U.S. 445,451-452 (1982); Buchanan v. Stanships, Inc., ___U.S.___,___, 108 S.Ct. 1130,1131-1132 (1988) and Budinich v. Dickinson Co., ___U.S.___,___, 108 S.Ct. 1717, 1721 (1988).

Since the Cross-Petition involves a separate judgment, the Board was not entitled to the extra thirty (30) day extension of time for filing provided by this Court's Rule 19.5.

I. LOUDERMILL SUCCEEDED ON A SIGNIFICANT ISSUE INVOLVED IN THE LITIGATION THAT ACHIEVED A PRIMARY BENEFIT SOUGHT BY HIM IN HIS ORIGINAL SUIT.

Initially, on page 8 of its Cross-Petition for a Writ of Certiorari, the Board states that this Court's prior decision in this case, 470 U.S. 532 (1985), did not declare Ohio Rev. Code Sec. 124.34 unconstitutional. If we deal in semantics, perhaps it could be said that R.C. 124.34 was not killed by this Court, but it was certainly mortally wounded by the language to be found at page 541:

> In short, once it is determined that the Due Process Clause applies 'the question remains what process is due.' Morrisey v. Brewer, 408 U.S. 471,481 (1972). The answer to that question is not to be found in the Ohio statute. (Emphasis)

Additionally, on page 8 of the Board's Cross-Petition, it is stated that Loudermill did not seek the right to a pretermination hearing in his Complaint. Now, just a minute! In his Complaint, the following language is to be found:

> 19. The plaintiff was not given any opportunity prior to his removal to respond to the charges against him although he had a legitimate defense since he thought that he was convicted of a misdemeanor.
>
> 23. The plaintiff was denied due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution by the defendants Cleveland Board of Education and Cleveland Civil Service Commission when he was given no opportunity prior to his removal to respond to the charges against him and when he was denied a speedy resolution to his claim that his removal was unlawful and unfair.
>
> 25. Ohio Revised Code Section 124.34 is unconstitutional on its face because it provides no opportunity for a classified civil service employee to respond to the charges against him prior to his removal or suspension.

Of determinative importance, however, the right to any sort of pretermination procedures for tenured governmental employees was certainly not the law in Ohio prior to this Court's 1985 Loudermill decision. Parfitt v. Columbus Correctional Facility, 62 Ohio St.2d 434,438 (1980).

In its second Opinion in this case, the Sixth Circuit Court of Appeals found that even though this case was never certified as a class action; nevertheless:

> [t]he Supreme Court granted relief to Loudermill's class, over 16 million tenured governmental employees, and this relief was the type originally sought by Loudermill.
>
> After Loudermill, as his attorneys demonstrated in the lower court, the Cleveland Civil Service Commission changed its rules to comply with the procedures mandated by the Supreme Court. As such, Loudermill has established a causal relationship between his lawsuit and the change of pretermination procedures as required by law. Because of this change, it was not an abuse of discretion for the district court to hold that he was the 'catalyst' in procuring this change even though he garnered no individual relief.
>
> In sum, all of the Board's arguments ignore the effect that the Supreme Court's landmark decision in Loudermill has had on this area of federal constitutional rights. As such, the lower court did not abuse its discretion in holding Loudermill to be a 'prevailing party' and thereby granting him attorney fees.
> (Loudermill Petition, Appendix, Ct. of App. Op., page 18.)

Moreover, the legislative history of the federal civil rights attorney fees statute, 42 U.S.C. Sec. 1988, approved the award of attorney fees when a party was successful in obtaining benefits for a class, even though he received no personal relief. Hensley v. Eckerhart, 461 U.S. 424,452-453 n.9 (1983). (Brennan, J., concurring in part and dissenting in part).

II. LOUDERMILL CAUSED A CHANGE IN THE PROCEDURAL REQUIREMENTS OF THE CLEVELAND BOARD OF EDUCATION REGARDING THE DISCIPLINING OF ITS TENURED EMPLOYEES.

On page 9 of its Cross-Petition, the Board states that the only evidence presented to the district court on the issue of attorney fees was an update of the Rules of the Cleveland Civil Service Commission.

Factually, Loudermill presented the district court with the Rules of the Cleveland Civil Service Commission prior to this Court's Loudermill decision (which made no provision for any pretermination procedures), as well as the Rules enacted after such decision (which did provide for pretermination procedures).

Attention is directed to the fact that under Ohio Rev. Code Sec. 124.40(A) the Rules of the Cleveland Civil Service Commission for the disciplining of tenured employees are the same Rules for the Cleveland Board of Education. Lorain Board of Education v. Lorain Civil Service Commission, 30 Ohio App.3d 127 (1985). Also see the Sixth Circuit Court of Appeals decision herein to the same effect. (Loudermill Petition, Appendix, page 16, n.6).

At the trial upon remand, the Board failed to present even a scintilla of evidence that it had a practice of providing pretermination procedures to its tenured employees prior to the Loudermill decision.

III. THE ACTUAL FEDERAL CONSTITUTIONAL DUE PROCESS PRETERMINATION REQUIREMENTS WERE NOT DETERMINED BY THIS COURT UNTIL THE LOUDERMILL DECISION.

The Board contends in its Cross-Petition that the right to pretermination procedures was established prior to this Court's 1985 Loudermill decision, citing Davis v. Scherer, 468 U.S. 183, 192 n.10 (1984).

It is interesting to note that during the original appeals to the Sixth Circuit and this Court, the Board's steadfast position was that, based upon prior decisions of this Court, Due Process did not require any pretermination procedures. Besides, this Court in Davis v. Scherer, supra, held that it had not as yet determined what kind of pretermination hearing had to be provided under Due Process, and that the employer was entitled to qualified immunity because the precise Due Process requirements were "not clearly established."

It is a tenet of this Court that it does not decide federal constitutional issues in the absence of the necessity therefor. Paulussen v. Herion, ___U.S.___,___, 106 S.Ct. 1339,1340 (1986)

and Rescue Army v. Municipal Court, 331 U.S. 549 (1949). As such, it must be presumed that this Court took the Loudermill case for the purpose of further interpretation and clarification of the perplexing issue involved.

Further, this Court's Loudermill decision finally laid to rest the question (established by the plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974)) as to whether or not a federally constitutionally protected property interest could be conditioned upon the procedures established in a state statute pertaining to such deprivation. See Federal Pretermination Rights for State Employees, 54 Cinn. L. Rev. 1069 (1986), Erik Koehler Foster, and Due Process Constitutional Guaranty, Not Legislative Grace, 25 Duq. L. Rev. 345, Winter, 1987.

IV. LOUDERMILL OBTAINED SUBSTANTIVE RELIEF FOR HIS CLASS OF 16 MILLION TENURED EMPLOYEES; AND SUCH RELIEF CONSTITUTED FAR MORE THAN A MERE PROCEDURAL VICTORY.

Another tenet is that the Supreme Court of the United States is the final authority in determining the meaning and application of the Constitution of the United States. Connick v. Myers, 461 U.S. 138,150 (1983) and Pennek v. Florida, 328 U.S. 331,335 (1944).

Moreover, the touchstone of procedural Due Process is to protect the individual from arbitrary governmental action, Wolff v. McDonnell, 418 U.S. 539,558 (1974), by requiring the government to follow appropriate procedures when it decides to deprive an individual of life, liberty or property in accordance with the fairplay concept that is inherent in the Due Process Clause. Daniels v. Williams, 474 U.S. 327,331 (1986).

It was Loudermill's purpose to establish federal constitutional pretermination Due Process requirements for all tenured governmental employees in the United States -- which he accomplished by this Court's Loudermill decision. Therefore, unlike

the case of Hanrahan v. Hampton, 446 U.S. 754,757 (1980), cited by the Board in its Cross-Petition, Loudermill established "the entitlement to relief on the merits" of his class action claim; namely, that Due Process required some pretermination procedures for tenured governmental employees. Accordingly, he accomplished far more than a mere procedural victory for the multitude of governmental workers whose cause he championed.

Additionally, the legislative history of the federal civil rights attorney fees statute, Sec. 1988, indicates that counsel fees should be awarded pendente lite, citing Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974), and that such awards were appropriate when a party has prevailed on an important matter in the course of litigation -- even when he does not ultimately prevail on all issues. See S. Report No. 1011, 94th Congress, 2d Sess. 5, reprinted in 1976 U.S. Code Cong. Admin. News 5908,5912.

The district court's Order finding Loudermill to be a "prevailing party" (and confirmed by the Sixth Circuit) is consistent with the primary purpose of the federal civil rights attorney fees statute; i.e., to have private parties, instead of the government, bring suits to vindicate federal civil rights. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-402 (1968).

CONCLUSION

Based on all that has preceded, the Board's Cross-Petition should be stricken or denied.

Respectfully submitted,

BERGER & FERTEL
SANFORD J. BERGER, counsel of record
ROBERT M. FERTEL
1836 Euclid Ave., Room 305
Cleveland, Ohio 44115-2234
Phone: (216) 781-5950

Lawyers for the Cross-Respondent